In the High Court of Judicature at Madras

Dated:20.03.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.911 OF 1997

1. V.Sundari
2. K.Viswanathan ..Appellants/Plaintiffs.

v

Mrs.Jayalakshmi ..Respondent/1st Respondent.

This second appeal is filed against the judgment and decree dated 21.12.1995 made in A.S.No.133 of 1995 on the file of II Additional Judge, City Civil Court, Chennai, reversing the decree and Judgment in O.S.No.2012 of 1987 dated 7.12.1993 on the file of VIII Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.C.Hanumantha Rao
For Respondent : Mr.B.Divakaran

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.133 of 1995 on the file of the II Additional Judge, City Civil Court, Chennai. The plaintiffs, who got a decree for mandatory injunction in respect of the plaint schedule property which is a comman passage, but lost their defence before the first appellate Court are the appellants herein.

2. The averments in the plaint in brief for the purpose of deciding this appeal sans irrelevant particulars are as follows:
The suit is for an order of mandatory injunction for removal of a new construction put up by the first defendant in the suit property which is marked as "AEFD" a common passage and for an order of permanent injunction. The plaintiffs have purchased the suit property situate at door No.2, Krishnapuram Street, Choolaimedu, Chennai-600 094 through registered Documents 5231/80 and 5233/80 respectively from defendants 2 to 8 . As per these documents, there is a common passage measuring north to south on the eastern and western side 93 feet and east to west on the northern and southern side 10 feet as shown in the plans annexed to the

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plaint. The said common passage belongs to the first and second plaintiffs and not defendants 2 to 8. From the date of purchase by the plaintiffs, they have been in use and enjoyment of the said common passage.

2a) The first defendant encroached the common passage by way of constructing a compound wall and gate. At the time of encroachment , the plaintiffs personally informed and requested the first defendant not to construct any compound wall or gate in the common passage which belongs to the plaintiffs and the defendants 2 to 8 as per the said documents. Even though the defendants 2 to 8 are also having right over the said common passage, they did not protest the said encroachment and construction of compound wall and gate by the first defendant in the said place more specifically explained in the plaint schedule or in the sketch. The defendants 2 to 8 had colluded with the first defendant, with an abundant caution, the defendants have impleaded as Defendants 2 to 8 as party in the suit. The first defendant had constructed a compound wall and gate in the common passage encroaching 5' and 6" north to south on the eastern and western side and 10' east to west on northern and southern side, that is to say, the land covered by"AEFD". The first defendant has no right whatsoever to encroach in the common passage and put up new construction, viz., compound wall and gate. The plaintiffs issued notices through their advocate on 4.6.1985 to the first defendant and was replied by the first defendant on 20.6.1985 with frivolous allegtions . The plaintiffs also issued notices to defendants 2 to 8 on 25.10.1985 except 4th defendant, defendants 2,3 and 5 to 8 had refused to accept the notice. Even after the receipt of the notice, the fourth defendant has not chosen to send any reply. Hence the suit.

3. The first defendant in his written statement would contend that with the malafide intention of causing hardship and inconvenience to this defendant, the plaintiffs have filed the suit. This defendant is the absolute owner of the property bearing Door No.2/A, Krishnapuram Street, Choolaimedu, Madras comprised in Block No.21, S.No.73/Part present TS.No.73/2 with right over the common passage. This defendant has constructed the building well within their property and she is in enjoyment of the same. The plaintiffs are not in use and enjoyment of the common passage. It is not correct to say that this defendant encroached on the common passage as alleged in the plaint. At the time of constructing the compound wall and gate, the plaintiffs have not raised any objection. The plaintiffs are not the owners of the common passage and the defendants 2 to 8 are the absolute owners. The defendants 2 to 8 have not colluded with this defendant in putting up the compound wall and the gate. The plaintiffs had no right in respect of the suit property shown as "EFAD" in the plaint schedule. The portion marked as "EFAD" in the rough sketch belongs to the first defendant who has purchased the same under a sale deed. With an idea of causing hardship to this defendant and blackmailing her, the plaintiffs have issued a lawyer's notice dated 4.6.1985 which was suitably replied by this defendant. The first

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defendant has put up a compound wall and gate on her patta land and she is absolute owner of the same. The plaintiffs have no manner of right, title or interest over the place where this defendant has put up the gate. She constructed the compound wall in the year 1982. The plaintiffs have issued a notice in the year 1985 with malafide intention. It is not true that the common passage is being used by the plaintiffs and defendants 2 to 8. This defendant has not encroached on the common passage and constructed a compound wall and gate as alleged in the plaint. The suit is barred by limitation. There is no cause of action to file the suit. Hence the suit is liable to be dismissed with costs.

4 Defendants 2 to 8 have filed a joint written statement contending as follows:
The plaintiffs without obeying the order passed by the Principal Judge in O.P.No.654 of 1980 in depositing the minor's share amount in Court, who granted permission to alienate 1/7th share of the minor B.Gopalakrishnan , 8th defendant by then a minor got the sale executed and registered by the 5th defendant, mother and guardian of the 8th defendant. When the root of the transactions itself are questioned as null and void the present suit for mandatory injunction is not maintainable at all. Without prejudice to the above the defendants further state that the alleged pathway in respect of which injunction is sought for is not a common pathway as incorrectly claimed in the plaint and exclusively meant for the defendant and the plaintiffs has separate entrance for the property. If at all the plaintiffs have any right, they should have sought for a declaration that the passage is common and relief for the bare mandatory injunction is bad in law and not maintainable. The suit is highly motivated and as a counter blast to the suit filed by the 8th defendant in O.S.No.6277 of 1987 against the plaintiffs herein. The boundaries to the sale deed never speak of common passage and the assumption of common passage is totally devoid of merits. Once the sale deed which is the subject matter of O.S.No.6277 of 1987 is set aside, the present suit is automatically become non-est in law.

5. On the above pleadings, the learned trial Judge has framed four issues for trial. On the side of the plaintiffs, Thiru Natarajan, the brother of the first plaintiff has examined himself as P.W.1 and second plaintiff is the brother-in-law of the first plaintiff and Exs A1 to A12 were exhibited. On the side of the defendants, Thiru Narayanapillai, the husband of the first defendant has examined as D.W.1 and Exs B1 to B5 were marked. A Commissioner was appointed in this case to note down the physical features and his report is Ex C1 and plan is Ex C2.

6. After going through the available oral and documentary evidence let in by both sides, the learned trial Judge has come to a conclusion that the plaintiffs are entitled to the relief asked for in the plaint and accordingly decreed the suit . Aggrieved by the Judgement of the learned trial Judge, the defendants have preferred an appeal in A.S.No.133 of 1995 before the II Additional Judge, City Civil Court, Chennai. The

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learned first appellate Judge, after going through the rival submissions of the parties and after scanning the evidence both oral and documentary and after perusing the Commissioner's report and plan has held that the plaintiffs are not entitled to any relief in the suit and accordingly he allowed the appeal thereby dismissing the suit filed by the plaintiffs which necessitated the plaintiffs to come before this Court by way of second appeal.

7. The substantial questions of law involved in this appeal are

" 1. Whether the non filing of the objection to the Commissioner's report will amount to the acceptance of the Commissioner's report?

2. Whether the measurements given by the Advocate Commissioner prevails over the measurement given in the registered sale deeds?

8. Heard Mr.C.Hanumantha Rao, learned counsel appearing for the appellants and Mr. B.Divakaran, learned counsel appearing for the respondent and considered their respective submissions.

9.The Points:

The plaintiffs claim to have purchased the property situate at door No.2, Krishnapuram Street, Choolaimedu, Chennai-94 in Survey No.73(Part) of Puliyur Division Block NO.21, measuring 98 feet on the east and west and 37 feet east west on the north and south under two sale deeds viz., Ex A1 and Ex A12. Ex A1 is in favour of the first plaintiff and Ex A12 is in favour of the second plaintiff. The first plaintiff's property is adjoining to the second plaintiff's property on the south.

10. It is the case of the plaintiffs that west of the property purchased under Exs A1 and A12 , there exists a common pathway measuring 93 feet x 10 feet and that the first defendant has put up a new construction in the common pathway and put up a gate also thereby causing inconvenience and obstruction for the plaintiffs to use the said common passage. Hence the plaintiffs have filed the suit for mandatory injunction to remove the new construction put up by the first defendant and also for permanent injunction restraining the defendants from in any way interfering with the suit property ,common pathway. The first defendant has purchased the property under Ex B1 sale deed which is situate south of the common passage messuring 58' north south on the east 53' north south on the west, 46' east west on the south and 55' north south on the north.

11. A Commissioner has been appointed to note down the physical features of the properties. The learned Commissioner has visited the property and filed his report Ex C1 and plan Ex C2. The learned Commissioner at paragraph 4(b) of his report earmarked the properties belonging to the first plaintiff, second plaintiff , defendants 2 to 8 and the first defendant. In EX C2 plan, the Commissioner has noted the common

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passage with a measurement of 97'8" on the east and 88' on the west . The only point to be decided in this case is whether the defendants have put up "ABCD" gate, on the new construction marked by the Commissioner in the common pathway or the first defendant's property. The Commissioner has noted that 88' measurement on the west of the common passage starts from point"B" with an arrow mark towards south from point"B". The Commissioner has noted "BC" property measuring 10'. So the total measurement from point "B" upto the arrow point on the north near Krishnapuram street comes to 88'. The length of the common passage is 93' as described in Exs A1 and A12. If it is so, then 93' common passage will extend up to the middle of the point "BC". So definitely, the first defendant has put up the new construction not in the property purchased by him under Ex B1 but in the common passage only.

12. The first appellate Court failed to consider the arrow marking at point "B" and also at Krishnapuram Street end on the north has come to an erroneous conclusion that the first defendant has put up the new construction and the gate only in his property whereas the trial Court has considered all this aspects and has come to a conclusion that there is an encroachment by the first defendant in the common passage and granted the relief asked for in the plaint by the plaintiffs. Further it is to be noted except this common passage , there is no other way available for the plaintiffs 1 and 2 to reach Krishnapuram Street on the north. Even for defendants 1 to 8 the common pathway is the way to get ingress and egress to Krishnapuram Street on the north. Under such circumstances, it has become necessary for this Court to interfere with the findings of the learned first appellate Judge.

13. The learned counsel appearing for the respondents would contend that the respondents may be given an opportunity to file a suit for declaration. Such direction need not be given by this Court. It is open to the defendants to take necessary course, if they so advised. Even though the respondents say that they have filed objection to the Commissioner's report and plan,on their objection, Exs C1 and C2 were not set aside by the trial Court. Even this point was not agitated before the first appellate Court. Under such circumstances, Exs C1 and C2 have become final. Points are answered accordingly.

14. In the result, the appeal is allowed, setting aside the decree and Judgment in A.S.No.133 of 1995 on the file of the II Additional Judge, City Civil Court, Chennai and the decree and Judgment in O.S.No.2012 of 1987 on the file of VIII Assistant Judge, City Civil Court, Chennai is restored. The plaintiffs are entitled to cost through out. At this juncture, the learned counsel appearing for the respondents represents

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that in the interest of both parties, they may be allowed to agitate their rights by way of declaratory suit. It is left to the discretion of the parties to do so and there is no direction need to be given by this Court.

Sd/-
Asst. Registrar.

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Sub Asst.Registrar.

sg

To

1. The II Additional Judge, City Civil Court, Chennai

2. The VIII Assistant Judge, City Civil Court, Chennai

3. The Record Keeper, VR Section, High Court, Madras.

+ 1 CC To Mr. B.Divakaran, Advocate SR NO.17648

+ 1 CC To Mr.C.Hanumantha Rao, Advocate SR NO.17611

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